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## CITATIONS





823-101—68

Cases—Continued

# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 199

GEORGE B. HARRIS, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, PETITIONER

*v.*

LOUIS NELSON, WARDEN

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

### QUESTION PRESENTED

Whether the discovery provisions of the Federal Rules of Civil Procedure are applicable to federal habeas corpus proceedings.

### INTEREST OF THE UNITED STATES

The grant of certiorari in this case (392 U.S. 925) raises a question of major importance to the effective administration of criminal justice—*i.e.*, whether the discovery provisions of the Federal Rules of Civil Procedure apply as a matter of course in all cases in which a convicted criminal seeks to overturn his con-

viction in a collateral proceeding in a federal district court. The federal interest in the outcome of this litigation is substantial since it is apparent that, if the federal discovery rules are deemed applicable when the challenge is by habeas corpus, they would also apply in proceedings under 28 U.S.C. 2255—the federal statutory counterpart to habeas corpus "affording the same rights in another and more convenient forum." *United States* v. *Hayman*, 342 U.S. 205, 219; see also *Sanders* v. *United States*, 373 U.S. 1, 13–15; *Hill* v. *United States*, 368 U.S. 424, 427–428; *Schiebelhut* v. *United States*, 318 F. 2d 785 (C.A. 6); *Burleson* v. *United States*, 205 F. Supp. 331, 334 (W.D. Mo.); *Sullivan* v. *United States*, 198 F. Supp. 624 (S.D.N.Y.); Carter, *Pre-Trial Suggestions for Section 2255 Cases*, 32 F.R.D. 391, 396.

**STATEMENT**

On December 5, 1963, Alfred Walker was convicted in a California state court of possession of marijuana, in violation of Section 11530.5 of the California Health and Safety Code. After exhausting state appellate remedies, on November 22, 1965, he filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, alleging, as he had in the state courts, that the informant who provided the information leading to his arrest was not shown to have been reliable and that the evidence seized in the search incident to that arrest was therefore illegally obtained and improperly admitted into evidence at his trial. The state filed a return to the order to show cause on December 20,

1965. Counsel was appointed for Walker on March 16, 1966.

On August 15, 1966, a motion for an evidentiary hearing was granted by the district court. On October 20, 1966, counsel for petitioner served the respondent warden, pursuant to Rules 26(b) and 33 of the Federal Rules of Civil Procedure, with a series of interrogatories seeking discovery of certain facts relative to the prior reliability of the informant—*i.e.*, prior arrests and convictions based in whole or in part upon information obtained from this informant by the arresting officer in this case, as well as whether the arresting officer had previously obtained any information from the informant he "[d]id not consider reliable" or "[d]id not consider sufficient * * * to make an arrest or search without a warrant" (R. 34–35). Respondent objected to the interrogatories on the ground that the Rules of Civil Procedure do not apply to habeas corpus proceedings and that the statutory provision for interrogatories in habeas corpus, 28 U.S.C. 2246, authorizes interrogatories only as a means of obtaining evidence and not for discovery (R. 36–38). Without stating its reasons, the district court denied the objections and directed that the interrogatories be answered (R. 39). Upon respondent's petition for a writ of mandamus and/or prohibition, the Court of Appeals for the Ninth Circuit, on May 10, 1967, vacated the order of the district court authorizing the interrogatories. The court of appeals held that the discovery provisions of the Federal Rules of Civil Procedure were not applicable to habeas corpus proceedings and that 28 U.S.C. 2246 did not

authorize the use of interrogatories for discovery. *Wilson* v. *Harris*, 378 F. 2d 141; R. 40.

## ARGUMENT

### INTRODUCTION AND SUMMARY

As noted above, the interest of the United States arises primarily from the impact that the decision in this case will have on actions brought by federal prisoners under 28 U.S.C. 2255. We submit that the framers of the Civil Rules did not intend that they should apply in collateral proceedings and that their application would unduly obstruct the prompt disposition of such cases which the statutes contemplate.

In saying this, we do not wish to be understood to be arguing that the district court may never order discovery in a habeas corpus or Section 2255 proceeding. Indeed, we do not doubt that the statutory command that the court should "dispose of the matter as law and justice require" (28 U.S.C. 2243) would justify the court, in exceptional circumstances, in ordering discovery in such a proceeding. As we read the record, however, that question is not presented here. Counsel for the habeas corpus applicant here never purported to be invoking any inherent power of the court to order discovery (R. 34–35). Indeed, he relied solely on the civil rules provisions and served the interrogatories on respondent without any special order of the court. Insofar as the record reveals, the district court did not indicate that it was exercising an inherent power to order discovery under the circumstances (R. 39) and the court of appeals neither discussed nor suggested that inherent power under special cir-

cumstances was involved (R. 40–44).[1] Thus, it appears that the only question presented is whether the discovery provisions of the Rules of Civil Procedure apply as a matter of course in all habeas corpus proceedings.

In view of the close relationship between the original criminal trial and the habeas corpus proceeding there is no logical reason why there should be a greater degree of discovery in the collateral proceeding than existed prior to trial. The question arises only because proceedings in habeas corpus and under Section 2255 are technically "civil" in character; from this it is argued that they are governed by the Federal Rules of Civil Procedure—which provide a far broader right of discovery than is available in criminal prosecutions. But the fact is that the language of the Civil Rules clearly expresses the intention of the rule-makers that they should not apply in collateral proceedings. Moreover, the traditional purpose of habeas corpus—to provide swift determination of the legality of a prisoner's custody—would be frustrated if civil discovery procedures, with their attendant delays, were available as a matter of course in such proceedings. If some type of discovery is appropriate in such cases, any change in procedure should be accomplished by promulgating particular-

[1] The discovery sought by way of interrogatories does not appear to have been necessary to a fair hearing in the instant case. The applicant sought information from respondent warden concerning prior use of the informant by the arresting officer; but the arresting officer was known and had testified at preliminary hearing and trial on precisely the issue of the reliability of the informant. There is no reason to believe that the information sought could not have been obtained by questioning at the habeas corpus hearing.

ized rules which take into account the special dangers of abuse in this context, rather than by a simple extension of all of the discovery provisions of the Civil Rules to habeas corpus proceedings.

THE DISCOVERY PROVISIONS OF THE RULES OF CIVIL PROCEDURE DO NOT APPLY AS A MATTER OF COURSE IN HABEAS CORPUS OR SECTION 2255 PROCEEDINGS

1. Habeas corpus to review a state criminal conviction, and its federal statutory counterpart, 28 U.S.C. 2255, though labeled civil proceedings, cannot realistically be separated from the criminal source of the remedies sought. Compare *United States* v. *White*, 342 F. 2d 379, 382 (C.A. 4), certiorari denied, 382 U.S. 871, and *United States* v. *Kelly*, 269 F. 2d 448, 451–452 (C.A. 10), certiorari denied, 362 U.S. 904. The close interrelationship between the original criminal case and collateral attack on the criminal judgment suggests that the procedures in the collateral proceeding should not vary substantially from those provided in the criminal prosecution. The limits of discovery available in a federal criminal trial are precisely defined in the Federal Rules of Criminal Procedure [2]

[2] The states vary widely in the availability of criminal discovery; however, few states have criminal discovery as broad as granted in the Federal Rules of Criminal Procedure, which have not been free of controversy. See Generally, *Panel on Pre-Trial Discovery in Criminal Cases*, 31 Brooklyn L. Rev. 320 (1965); Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 Duke L.J. 477; Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228 (1964); Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 Wash. U.L.Q. 279; Louisell, *Criminal Discovery: Dilemma Real or Apparent?* 49 Calif. L. Rev. 56 (1961); Louisell, *The Theory of Criminal Discovery and the*

and are much narrower than the broad discovery permitted under the Civil Rules. See Rule 16, F.R. Cr. P; cf. 18 U.S.C. 3500; Note, *Civil Discovery in Habeas Corpus,* 67 Colum. L. Rev. 1296, 1307–1309.

There is no reason to assume that the framers of the civil rules intended to give convicted criminals a greater right of discovery after trial than before. See *Wilson* v. *Weigel,* 387 F. 2d 632, 634 (C.A. 9), petition for certiorari pending *sub nom. Roberts* v. *Nelson,* No. 52 Misc., this Term. Indeed, the Civil Rules themselves clearly manifest that they were not intended to apply to habeas corpus proceedings.[3]

Rule 1 of the Federal Civil Rules recognized that certain "suits of a civil nature" were not to be governed by those rules. Rule 81(a)(2) expressly provided that habeas corpus was one of those "suits of a civil nature" to which the new rules were not to apply, except to the extent that the practice in habeas corpus proceedings had "heretofore conformed to the practice in actions at law or suits in equity" and was not governed by statute.[4] The language is not ambiguous.

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*Practice of Criminal Law, Appendix: Criminal Discovery in the States,* 14 Vand. L. Rev. 921, 938–945 (1961); Judicial Conference of the Second Judicial Circuit, *Discovery in Criminal Cases,* 44 F.R.D. 481 (1968).

[3] Since § 2255 was intended to serve the same purpose as habeas corpus (*United States* v. *Hayman,* 342 U.S. 205) there is no reason to differentiate between habeas corpus and Section 2255 proceedings with regard to the applicability of discovery rules.

[4] It should be noted that Rule 81(a)(2) was amended effective July 1, 1968, to eliminate as inappropriate any reference to appellate procedure in the civil rules following the effective date of the Federal Appellate Rules. It is agreed, however, that the amendment made no substantive change in the appropriate application of the civil rules to habeas corpus proceedings (Pet. Br. 24–25; N.A.A.C.P. *Amicus* Br. 8 note 6).

While a number of courts have applied various provisions of the Civil Rules in habeas corpus and Section 2255 proceedings without meaningful discussion, the sounder decisions have recognized the limitations of Rule 81 and carefully considered whether there was a statute bearing on the matter and, if not, whether the civil rule in question conformed to the previous practice in habeas corpus.[5]

2. Petitioner's contention that the Civil Rules should be applied in habeas corpus proceedings is not

[5] See *Holiday* v. *Johnston*, 313 U.S. 342 (Rule 53 conflicts with 28 U.S.C. 2243); *Wilson* v. *Weigel*, 387 F. 2d 632 (C.A. 9), petition for a writ of certiorari pending *sub nom. Roberts* v. *Nelson*, No. 52 Misc., this Term (Rules 26 and 33 discovery provisions not applicable); *Hunter* v. *Thomas*, 173 F. 2d 810, 812 (C.A. 10) (Rule 59 applicable); *Albert* v. *Patterson*, 155 F. 2d 429, 432–433 (C.A. 1) (Rule 52(a) findings of fact and conclusions of law not applicable); *Burleson* v. *United States*, 205 F. Supp. 331, 334 (W.D. Mo.) (Rule 8 notice pleadings not applicable); *Sullivan* v. *United States*, 198 F. Supp. 624 (S.D.N.Y.) (Rule 33 discovery provisions not applicable); *United States ex rel. Corsetti* v. *Commanding Officer of Camp Upton*, 3 F.R.D. 360, 362 (E.D.N.Y.) (Rule 4(f) not applicable to determine territorial jurisdiction of habeas corpus); *United States* v. *Adams*, 3 F.R.D. 396, 404 (S.D.N.Y.) (Rule 52 findings of fact not applicable); cf. *United States ex rel. Goldsby* v. *Harpole*, 249 F. 2d 417, 420 note 3 (C.A. 5); *United States ex rel Jelic* v. *District Director*, 106 F. 2d 14 (C.A. 2); *Hardison* v. *Dunbar*, 256 F. Supp. 412 (N.D. Cal).

Petitioner and N.A.A.C.P. *Amicus* both urge that the term "practice" as used in Rule 81(a)(2) should be construed as referring to the "general format of proceeding" rather than any "specific procedure" (Pet. Br. 34–35; *Amicus* Br. 24–27). Even assuming as much, a move to pre-trial discovery in habeas corpus to provide the factual basis for issuance of the writ, is a substantial departure in format. Moreover, this Court clearly considered the taking of depositions for discovery a "practice" in *Miner* v. *Atlass*, 363 U.S. 641, 647.

only contrary to the plain language of the rules themselves but is also significantly at odds with the traditional nature and purpose of habeas corpus and its statutory counterpart, 28 U.S.C. 2255. It is well settled that in a habeas corpus or Section 2255 proceeding the petitioner may not state only bald legal conclusions but must meet the statutory test of alleging facts which, if accepted at face value, would entitle him to relief.[6] See *Sanders* v. *United States,* 373 U.S. 1, 13–15; *Brown* v. *Allen,* 344 U.S. 443, 461, 502, 547–548; *Anderson* v. *United States,* 367 F. 2d 553, 554 (C.A. 10), certiorari denied, 386 U.S. 1025; *United States* v. *Lowe,* 367 F. 2d 44, 45–46 (C.A. 7); *Wheeler* v. *United States,* 340 F. 2d 119, 121 (C.A. 8); *Davis* v. *United States,* 311 F. 2d 495, 496 (C.A. 7), certiorari denied, 374 U.S. 846; 28 U.S.C. 2242 (1964); 28 U.S.C. 2244, 2254 (Supp. III, 1965–1967). Moreover habeas corpus and Section 2255 proceedings are summary in nature and contemplate swift resolution of disputed issues of custody. See *Brown* v. *Allen,* 344 U.S. 443, 462; *Holiday* v. *Johnston,* 313 U.S. 342; *Storti* v. *Massachusetts,* 183 U.S. 138, 143; *Ex parte Royall,* 117 U.S. 241, 250–253; 28 U.S.C. 2242–2243, 2255. Both the habeas corpus statutes (see 28 U.S.C. 2243) and 28 U.S.C. 2255 expressly provide for prompt consideration of the claim for relief. See *Ruby* v. *United States,* 341 F. 2d 585 (C.A. 9), certiorari denied, 384 U.S. 979.

[6] By way of contrast, "[i]n most cases under the Federal [Civil] Rules the function of the pleadings extends hardly beyond notification to the opposing parties of the general nature of a party's claim or defense." 2 Moore's Federal Practice § 26.01, p. 2442 (1938).

These fundamental attributes of habeas corpus and Section 2255 proceedings—factual allegations in the petition which on their face justify relief and dispatch in determining whether the prisoner is being held contrary to law—would tend to be defeated if the discovery procedures of the Civil Rules with their attendant delays were to be made available, as a matter of course, in such proceedings.

The delay that can result from the handling of a habeas corpus petition as a normal civil matter is illustrated by this case. The application was filed on November 22, 1965. A return to the order to show cause was made in December 1965, after which the court informed respondent that an evidentiary hearing *may* be required. The court then appointed an attorney to represent the applicant, apparently to investigate and compile the facts. Counsel set out to interview the informant. After getting an affidavit in which she recounted her participation in the investigation and admitted one other informing incident but denied several others, counsel on August 5, 1966, filed a motion for an evidentiary hearing and a pre-trial conference under Rule 16 of the civil rules. Both were approved on August 15, 1966 and a pre-trial conference set for September 1, 1966.[7] The discovery interrogatories were served on respondent on October 20, 1966, without leave of the court. On October 21, 1966, the court ordered respondent to answer them. Thus, almost one year after the application for habeas

[7] There is nothing in the record to indicate whether the pre-trial conference was held.

corpus was filed, it progressed to the "discovery" stage. Can it be doubted that both the habeas applicant's and the state's interest would have been better served if a prompt hearing had been held as contemplated and required by Congress?

To uphold the ruling of the court of appeals would not imply any view by this Court as to the desirability of having some discovery procedure in habeas corpus and Section 2255 proceedings. This Court has never been insensitive to the legitimate needs of the habeas corpus applicant (see, *e.g.*, *Sanders* v. *United States*, 373 U.S. 1; *Townsend* v. *Sain*, 372 U.S. 293; *Fay* v. *Noia*, 372 U.S. 391); nor has Congress, after due deliberation, been reluctant to make improved substance and procedure available to those in custody of law (see *United States* v. *Hayman*, 342 U.S. 205, 210–219). As the Court pointed out in *Miner* v. *Atlass*, *supra*, 363 U.S. at 651:

> Those who advise the Court with respect to the exercise of its rule-making powers—more particularly of course the Judicial Conference of the United States (28 U.S.C. § 331) * * * — are left wholly free to approach the question of amendment * * * of the rules in the light of whatever considerations seem relevant to them, including of course the experience gained by the District Courts * * *.

The potential for harassment and overburdening of the courts that would exist if civil discovery procedures were to be available as a matter of course in habeas corpus and Section 2255 proceedings makes this an area where it is particularly appropriate that any

change in procedure should come about only through the operation of the rule-making process. The federal district court dockets are flooded annually with an ever increasing load of state prisoner petitions. In addition, there has been a substantial increase in petitions by federal prisoners under Section 2255. The Annual Report of the Director of the Administrative Office of the United States Courts, pp. 135–137 (1967), shows that state habeas corpus petitions have increased from 1,903 in 1963 to almost 6,000 in 1967 while federal motions to vacate sentence have almost doubled in the same period—from 450 in 1963 to 818 in 1967 with a peak load of 1,122 in 1965. One out of every seven civil actions commenced in the United States District Courts during 1967 was one in which a prisoner was petitioner. Experience has shown that many of these collateral review petitions are drafted by the prisoners without benefit of legal counsel, are often repeater petitions continuing for years after the original conviction, and that a substantial majority are almost wholly without merit. See *Brown* v. *Allen,* 344 U.S. 443, 536–540 (Mr. Justice Jackson concurring in result); *United States* v. *Hayman,* 342 U.S. 205, 212–213; The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts,* pp. 45–47 (1967); *Applications for Writs of Habeas Corpus and Post Conviction Review of Sentences in the United States Courts,* 33 F.R.D. 363, 384–385, 409–411, 413–416, 453, 484, 488–489. The burdens imposed have become a matter of continuing and increasing concern to both prosecutors and judges.

*Task Force Report: The Courts, supra,* at pp. 45–47.

If each petitioner were entitled to the full use of civil discovery procedures, the opportunities for abuse of the writ would be greatly increased. For example, every prisoner, simply by filing a petition alleging that the government knowingly used perjured evidence against him, would become entitled to depose the prosecutor, all witnesses and all law enforcement officials associated with the investigation. Similarly, by merely alleging the suppression of exculpatory evidence, every criminal defendant could obtain discovery of virtually all the information in the prosecution's files. Not only would such motions place a tremendous burden on the already overburdened staff in most prosecutors' offices, it would also place great burdens on the courts which would, no doubt, be called upon in almost every case to rule upon questions of privilege and materiality.

These considerations make particularly appropriate here this Court's reasoning in *Miner* v. *Atlass,* 363 U.S. 641, 649–650.

> Discovery by deposition is at once more weighty and more complex a matter than either of the examples just discussed or others that might come to mind. Its introduction into federal procedure was one of the major achievements of the Civil Rules, and has been described by this Court as "one of the most significant innovations" of the rules. * * * Moreover, the choice of procedures adopted to govern various specific problems arising under the system was in some instances hardly less

significant than the initial decision to have such a system. It should be obvious that we are not here dealing either with a bare choice between an affirmative or a negative answer to a narrow question, or even less with the necessary choice of a rule to deal with a problem which must have an answer, but need not have any particular one. Rather, the matter is one which, though concededly "procedural," may be of as great importance to litigants as many a "substantive" doctrine * * *.

The problem then is one which peculiarly calls for exacting observance of the statutory procedures surrounding the rule-making powers of the Court, see 28 U.S.C. § 331 (advisory function of Judicial Conference), 28 U.S.C. § 2073 (prior report of proposed rule to Congress), *designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords.* * * * [Emphasis added.] [8]

[8] 28 U.S.C. 2073 has been repealed and combined with 28 U.S.C. 2072 (Supp. III, 1965–1967) providing that "[t]he Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases * * *."

Similar rule making power exists for criminal actions. See 18 U.S.C. 3771 and 3772.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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